

1977

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Recommended Citation

John W. Pharris, *Pain and Suffering Damages: A Move toward More Precision and Accuracy: Abbott v. Northwestern Bell Telephone Co.*, 197 Neb. 11, 246 N.W.2d 647 (1976), 56 Neb. L. Rev. 910 (1977)
Available at: <https://digitalcommons.unl.edu/nlr/vol56/iss4/8>

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Pain and Suffering Damages: A Move Toward More Precision And Accuracy

Abbott v. Northwestern Bell Telephone Co.,
197 Neb. 11, 246 N.W.2d 647 (1976).

I. INTRODUCTION

It has long been held that an award of damages for loss or impairment of future earning capacity should be reduced to its present value.¹ There has, however, been a split of authority as to whether damages for future pain and suffering should also be discounted to present value.² In Nebraska, it has been recognized that although there is no mathematical formula for translating pain and suffering into terms of dollars and cents, damages are nonetheless allowable.³ However, there has been considerable controversy in Nebraska as to whether these damages should be discounted to present value. Originally, cases dealing with the problem in Nebraska held that there should be no present value reduction for such dam-

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1. *Accord*, *Lake v. Southwick*, 188 Neb. 533, 198 N.W.2d 319 (1972); *Borcharding v. Eklund*, 156 Neb. 196, 55 N.W.2d 643 (1952); *Russell v. City of Wildwood*, 428 F.2d 1176 (3d Cir. 1970); *Stewart v. Atlantic Gulf & Pac. Co.*, 9 F. Supp. 344 (D.C.S.D. Fla. 1934); *Florida Cent. & P.R.R. v. Burney*, 98 Ga. 1, 26 S.E. 730 (1895); *McCray v. Illinois Cent. R.R.*, 12 Ill. App. 2d 425, 139 N.E.2d 817 (1957); *Von Tersch v. Ahrendsen*, 251 Iowa 115, 99 N.W.2d 287 (1959); *Williams v. Clarke County*, 143 Iowa 328, 120 N.W. 306 (1909); *Rigley v. Pryor*, 290 Mo. 10, 233 S.W. 828 (1921); *Daughtry v. Cline*, 224 N.C. 381, 30 S.E.2d 322 (1944); *Maus v. New York, Chicago & St. Louis R.R.*, 165 Ohio St. 281, 135 N.E.2d 253 (1956); *McCaffrey v. Schwartz*, 285 Pa. 561, 132 A. 810 (1926); *Wentz v. T.E. Connolly, Inc.*, 45 Wash. 2d 127, 273 P.2d 485 (1954). *See also*, C. McCORMICK, DAMAGES § 86 (1935); RESTATEMENT OF TORTS § 924(d) (1939); 22 AM. JUR. 2d DAMAGES § 96 (1965); Annot., 77 A.L.R. 1439 (1932); Annot., 154 A.L.R. 796 (1945).
 2. *See* 22 AM. JUR. 2d DAMAGES § 108 (1965); Annot., 28 A.L.R. 1177 (1924); Annot., 77 A.L.R. 1439, 1451 (1932); Annot., 154 A.L.R. 796, 801 (1945).
 3. *Zawada v. Anderson*, 181 Neb. 467, 474, 149 N.W.2d 329, 334 (1967); *Thorpe v. Zwonechek*, 177 Neb. 504, 515, 129 N.W.2d 483, 490 (1964); *Hert v. City Beverage Co.*, 167 Neb. 557, 563, 94 N.W.2d 27, 31 (1959).

ages.⁴ However, in *Abbott v. Northwestern Bell Telephone Co.*⁵ the Nebraska Supreme Court made it quite clear that future pain and suffering damages will now, like damages for loss or impairment of future earning capacity, be reduced to their present cash value.⁶ In so holding, Nebraska joins a small minority of states which require the present value reduction for future pain and suffering damages.⁷ The decision seems to indicate a fear on the court's part that unless the discount is made, the defendant is unduly and improperly penalized. This appears to be based on the belief that he is being required to pay a sum worth more today than the amount computed by the jury as necessary to fully compensate the plaintiff as the loss occurs in the future. For this reason, it is thought that the plaintiff is being overcompensated. This reasoning raises an interesting question. If the court is concerned with awarding the most precise and accurate judgment possible for pain and suffering damages, should it not require the jury to consider future inflation and prejudgment interest along with the earning power of money? If the court's goal is to precisely and accurately award the plaintiff no more and certainly no less than that to which he is rightfully entitled, it would seem only logical that the jury be so instructed. It would clearly be more equitable if the factors of inflation and prejudgment interest were given as much weight and consideration as the earning power of money when pain and suffering damages are awarded.

The purpose of this note will be to examine the conflict as to whether future pain and suffering damages should be reduced to present cash value. Additionally, it will explore the possibility of having Nebraska courts instruct their juries to give consideration not only to the earning power of money but also the equally important factors of future inflation and prejudgment interest when awarding pain and suffering damages.

II. THE FACTS

On August 24, 1970, the car which the plaintiff, Mr. George W. Abbott, was driving was struck in the rear by a motor vehicle

4. *Chicago & N.W. Ry. v. Candler*, 283 F. 881, 884-85 (8th Cir. 1922); *Culver v. Union Pac. R.R.*, 112 Neb. 441, 453, 199 N.W. 794, 798-99 (1924); *Kepler v. Chicago, St. P., M. & O. Ry.*, 111 Neb. 273, 287, 196 N.W. 161, 166-67 (1923).

5. 197 Neb. 11, 246 N.W.2d 647 (1976).

6. *Id.* at 16, 246 N.W.2d at 650.

7. *Gallagher v. Monroe*, 222 Mich. 202, 206, 192 N.W. 609, 610 (1923); *Rigley v. Pryor*, 290 Mo. 10, 24-26, 233 S.W. 828, 832 (1921); *Moss v. Southern Ry.*, 2 N.C. App. 50, 57, 162 S.E.2d 633, 638 (1968); *Fulsome v. Concord*, 46 Vt. 135, 142 (1872).

owned by the defendant, Northwestern Bell Telephone Co., and driven by one of its employees.⁸ Mr. Abbott brought an action for personal injury and the jury returned a verdict in his favor.⁹ He then appealed the verdict and assigned as error in one of his three counts that the court erred in giving instruction number eleven which directed the jury to reduce to present worth any award for future pain and suffering.¹⁰ Instruction number eleven to the jury was in part as follows:

In computing the damages arising in the future, if any, because of injuries, you must not simply multiply the damages by the length of time you have found they will continue or by the number of years you have found that the plaintiff is likely to live. Instead, you must determine their present cash value.¹¹

The only future damages claimed by Mr. Abbott were for pain and suffering relating to his claim of permanent injury.¹² Mr. Abbott cited *Chicago & N.W. Railway v. Candler*,¹³ *Kepler v. Chicago, St. P., M. & O. Railway*,¹⁴ and *Culver v. Union Pacific Railroad*,¹⁵ for authority that the future pain and suffering damages should not be reduced to present value.¹⁶ The Nebraska Supreme Court conceded that it had vacillated on the issue over the years¹⁷ but concluded on the basis of the more recent cases of *Wolfe v. Mendel*,¹⁸ *Zawada v. Anderson*,¹⁹ and *Oberhelman v. Blount*²⁰ that future damages for pain and suffering should be discounted to present value.²¹ The court agreed that the utility of the rule was arguable, but it felt that it was a rule everybody could live with if it was certain.²²

III. THE CONFLICT

In 1922, the Court of Appeals for the Eighth Circuit in *Chicago & N.W. Railway v. Candler*,²³ a Nebraska personal injury case, held that a damage award for future pain and suffering was not to be

8. 197 Neb. at 12, 246 N.W.2d at 648.

9. *Id.*

10. *Id.* at 13, 246 N.W.2d at 648.

11. *Id.* at 16, 246 N.W.2d at 650.

12. *Id.*

13. 283 F. 881 (8th Cir. 1922).

14. 111 Neb. 273, 196 N.W. 161 (1923).

15. 112 Neb. 441, 199 N.W. 794 (1924).

16. 197 Neb. at 16, 246 N.W.2d at 650.

17. *Id.*

18. 165 Neb. 16, 84 N.W.2d 109 (1957).

19. 181 Neb. 467, 149 N.W.2d 329 (1967).

20. 196 Neb. 42, 241 N.W.2d 355 (1976).

21. 197 Neb. at 16, 246 N.W.2d at 650.

22. *Id.*

23. 283 F. 881 (8th Cir. 1922).

restricted to the allowance of the present value of yearly estimates covering the probable duration of the plaintiff's life. The court's reasoning was as follows:

In the business world yearly inventories are made and balances struck, in profit and loss, in income, and in earnings. The application of the present value rule by the jury in making up the amount of damages to be allowed for the deprivation of pecuniary benefits arising from probable future earnings is not only just, but feasible. It is feasible because the jury may from actual past earnings, with other factors in the problem proven, set opposite each year of the estimated life the sum which would probably be earned that year These several sums can then be reduced to their present value. No such process is possible in estimating the amount to be allowed for pain and suffering, or for pain and inconvenience. In the matter of pain, suffering, or inconvenience, no books are kept, no inventories made, no balances struck.

Neither the plaintiff in the case nor any one else in the world has ever established a standard of value for these ills. The only proof ever received to guide the jury in determining the amount of the allowance they should make is, broadly stated, the nature and extent of the injury, its effects and results. They are instructed to allow a reasonable sum as compensation, and in determining what is reasonable under the evidence to be guided by their observation, experience and sense of fairness and right. At the best the allowance is an estimated sum determined by the intelligence and conscience of the jury, and we are convinced that a jury would be much more likely to return a just verdict, considering the estimated life as one single period, than if it should attempt to reach a verdict by dividing the life into yearly periods, setting down yearly estimates, and then reducing the estimates to their present value. The arbitrariness and artificiality of such a method is so apparent that to require a jury to apply it would, we think, be an absurdity.²⁴

It is important to note that the case was decided before the *Erie* Doctrine had been established, and it is not clear whether the eighth circuit was applying Nebraska law or federal common law in *Candler*. Since the court cited no Nebraska cases in its decision, it is probably more correct to assume that federal common law was applied.

The Nebraska Supreme Court, without expressly citing to *Candler*, adopted a line of reasoning similar to that of the court of appeals when it decided *Kepler v. Chicago, St. P., M. & O. Railway*,²⁵ and *Culver v. Union Pacific Railroad*.²⁶ Nebraska, however, was not the only state to formulate rules prohibiting the discounting of future pain and suffering awards. Similar rules can also be

24. *Id.* at 884-85.

25. 111 Neb. 273, 196 N.W. 161 (1923).

26. 112 Neb. 441, 199 N.W. 794 (1924).

found in a majority of state court opinions including those of Pennsylvania,²⁷ Florida,²⁸ Georgia,²⁹ Wyoming,³⁰ Nevada,³¹ Alaska,³² and Oklahoma.³³ The Georgia decisions are particularly interesting. In 1920, the Georgia Court of Appeals held that it was not erroneous for the jury to be instructed to reduce all allowances for future pain and suffering to present cash value.³⁴ However, in 1926, which interestingly enough was after *Candler* was decided, the court changed its position in reliance on Pennsylvania case law and held that a jury, in a suit where future pain and suffering damages are sought, should not be instructed to reduce such damages to their present worth.³⁵ The court has since maintained this latter position in numerous cases.³⁶ The Florida Supreme Court, in citing to *Candler*,³⁷ best summed up the concern of the majority for unduly complicating the jury's job of determining pain and suffering damages by requiring them to also reduce such allowance to its present cash value when it stated:

Their [the jury's] problem is not one of mathematical calculation but involves an exercise of their sound judgment of what is fair and right. The problem is often further complicated by the fact that the pain and suffering are yet to be suffered and thus even further removed from exact calculation and certain measurement. But such further uncertainty does not change the problem from one of judgment to one of calculation. It still rests within the enlightened conscience of the jury. We think, therefore, that the aspect of present compensation for future pain is merely one of the subjective elements of the problem, and is not a process of mathematical calculation of present value, such as must be applied to

27. See *O'Hara v. Scranton*, 342 Pa. 137, 19 A.2d 114 (1941); *Yost v. West Penn Ry.*, 336 Pa. 407, 9 A.2d 368 (1939); *Hunter v. Pope*, 289 Pa. 560, 137 A. 731 (1927); *Sebastian v. Philadelphia & R. Coal & I.*, 262 Pa. 510, 105 A. 887 (1919); *Ford v. Philadelphia & R. Coal & I.*, 262 Pa. 514, 105 A. 885 (1919); *Bostwick v. Pittsburgh Ry.*, 255 Pa. 387, 100 A. 123 (1917); *McLane v. Pittsburgh Ry.*, 230 Pa. 29, 79 A. 237 (1911); *Renner v. Sentle*, 151 Pa. Super. 231, 30 A.2d 220 (1943).

28. *Braddock v. Seaboard Air Line R.R.*, 80 So. 2d 662, 666 (Fla. 1955).

29. See *National Trailer Convoy v. Sutton*, 136 Ga. App. 760, 764, 222 S.E.2d 98, 101 (1975); *St. Paul Fire & Marine Ins. Co. v. Dillingham*, 112 Ga. App. 422, 424, 145 S.E.2d 624, 626 (1965); *Bagley v. Akins*, 110 Ga. App. 338, 338, 138 S.E.2d 430, 431 (1964); *Louisville & N.R.R. v. Bean*, 49 Ga. App. 4, 8, 174 S.E. 209, 211 (1934); *Southern Ry. v. Bottoms*, 35 Ga. App. 804, 134 S.E. 824, 825 (1926).

30. *Borzea v. Anselmi*, 71 Wyo. 348, 373-74, 258 P.2d 796, 804 (1952).

31. *Porter v. Funkhouser*, 79 Nev. 273, 278-79, 382 P.2d 216, 218-19 (1963).

32. *Beaulieu v. Elliott*, 434 P.2d 665, 676 (Alaska 1967).

33. *Bready v. Tipton*, 407 P.2d 194, 206 (Okla. 1965).

34. *Pidcock v. West*, 24 Ga. App. 785, 788-90, 102 S.E. 360, 362 (1920).

35. *Southern Ry. v. Bottoms*, 35 Ga. App. 804, 804, 134 S.E. 824, 825 (1926).

36. See note 29 *supra*.

37. *Braddock v. Seaboard Air Line R.R.*, 80 So. 2d 662, 666 (Fla. 1955).

periodic future pecuniary losses. We think, as has been said by others, that to treat future pain and suffering as the loss of an annuity is an absurdity.³⁸

The majority of state courts have not, however, been the only courts to require that pain and suffering damages not be reduced to present cash value. A number of federal courts have applied the rule as well when applying federal law in cases brought under the Federal Employers Liability Act³⁹ and admiralty law.⁴⁰ It is interesting to note that in refusing to allow pain and suffering damages to be reduced to present value the majority of the federal courts rely upon the *Candler* case as controlling authority.⁴¹ In recent years, only one federal court has allowed damages for future pain and suffering to be reduced to present value.⁴² However, the court later admitted that its decision was erroneous.⁴³

38. *Id.* at 668.

39. *Taylor v. Denver & Rio Grande W.R.R.*, 438 F.2d 351, 353 (10th Cir. 1971); *Texas & Pac. Ry. v. Buckles*, 232 F.2d 257, 264 (5th Cir. 1956); *Sleeman v. Chesapeake & Ohio Ry.*, 305 F. Supp. 33, 35 (W.D. Mich. 1969) (giving rule cognizance but refusing to apply it at that time since neither the plaintiff's counsel or the judge was aware of it at the original trial); *Schirra v. Delaware, L. & W.R.R.*, 103 F. Supp. 812, 823 (M.D. Pa. 1952).

40. *Yodice v. Koninklijke Nederlandsche Stoomboot Maatschappij*, 443 F.2d 76, 77 (2d Cir. 1971); *Henderson v. S.C. Loveland Co.*, 390 F. Supp. 347, 352-53 (N.D. Fla. 1974) (refusing to allow future pain and suffering to be reduced to present value but allowing defendant to point out to jury that a payment of monies now was being made for pain and suffering not to be experienced until the future, particularly where plaintiff has a long life expectancy.); *Hanson v. Reiss Steamship Co.*, 184 F. Supp. 545, 553 (D. Del. 1960).

41. *Taylor v. Denver & Rio Grande W.R.R.*, 438 F.2d 351, 353 (10th Cir. 1971); *Texas & Pac. Ry. v. Buckles*, 232 F.2d 257, 264 (5th Cir. 1956); *Sleeman v. Chesapeake & Ohio Ry.*, 305 F. Supp. 33, 36 n.1 (W.D. Mich. 1969); *Hanson v. Reiss Steamship Co.*, 184 F. Supp. 545, 553 (D. Del. 1960).

42. *Sleeman v. Chesapeake & Ohio R.R.*, 290 F. Supp. 817, 825 (W.D. Mich. 1968).

43. The case was subsequently appealed to the United States Court of Appeals for the Sixth Circuit which remanded the case for recomputation of damages. *Sleeman v. Chesapeake & Ohio R.R.*, 414 F.2d 305, 308 (6th Cir. 1969). On remand, the district court refigured the plaintiff's future earnings as instructed by the sixth circuit and noted that the defendant had received an additional windfall with respect to damages for future pain and suffering at the original trial. *Sleeman v. Chesapeake & Ohio R.R.*, 305 F. Supp. 33, 36 n.1 (W.D. Mich. 1969). The district court stated that both it and the plaintiff were unaware at trial of the line of federal cases holding that an award for future pain and suffering need not be reduced to present worth. However, because of this unawareness, the court declined to alter its award for future pain and suffering at that time. *Id.*

In addition to the *Candler* decision, the federal courts have relied on the federal jury instructions as being the basis on which to deny reduction of future pain and suffering damages to present value.⁴⁴ The history behind these federal jury instructions is intriguing. The 1965 edition⁴⁵ stated in relevant part as follows:

If the jury should find that the plaintiff is entitled to a verdict, and further find that the evidence in the case establishes any one or more of the following items of actual damage: . . . (3) a reasonable likelihood of future pain or suffering or mental anguish; then it becomes the duty of the jury to ascertain the present worth in dollars of such future damage, since the award of future damages necessarily requires that payment be made now for a loss that will not actually be sustained until some future date.⁴⁶

However, in the recent edition of the instructions,⁴⁷ the authors have deleted the requirement of reducing damages for future pain and suffering to present value.⁴⁸ In the notes, the authors state that, "[t]he instruction in the initial edition has been modified to exclude a requirement of reduction of damages for 'future pain and suffering,' on the ground that such a requirement is not a part of the law of most states."⁴⁹ In other words, due to the heavy reliance given by the majority of states to the *Candler* rationale the federal jury instructions no longer require a reduction to present value of future pain and suffering damages.

Despite this tremendous weight of authority and precedent, the Nebraska Supreme Court in *Abbott v. Northwestern Bell Telephone Co.*,⁵⁰ made it quite clear that in Nebraska, juries are now to be instructed to reduce damages for future pain and suffering to present value.⁵¹ As authority for its decision, the court cited *Wolfe v. Mendel*,⁵² *Zawada v. Anderson*,⁵³ and *Oberhelman v. Blount*.⁵⁴ A close examination of these cases, however, creates considerable doubt in regard to their value as authority for such a holding.

To begin with, the court in *Wolfe* was confronted with the question of whether the trial court had prejudicially erred in failing to give instructions that damages for loss of future earnings must

44. *Taylor v. Denver & Rio Grande W.R.R.*, 438 F.2d at 353.

45. W. MATHES & E. DEVITT, *FEDERAL JURY PRACTICE AND INSTRUCTIONS* (1965).

46. *Id.* § 76.12.

47. 2 E. DEVITT & C. BLACKMAR, *FEDERAL JURY INSTRUCTIONS* (2d ed. 1970).

48. *Id.* § 78.13.

49. *Id.* § 78.13 note.

50. 197 Neb. 11, 246 N.W.2d 647 (1976).

51. *Id.* at 16, 246 N.W.2d at 650.

52. 165 Neb. 16, 84 N.W.2d 109 (1957).

53. 181 Neb. 467, 149 N.W.2d 329 (1967).

54. 196 Neb. 42, 241 N.W.2d 355 (1976).

be reduced to their present worth.⁵⁵ In holding that failure to give such instruction, when not requested, was not prejudicial error, the court in dicta added, "[w]e think it just as essential that the value of future pain and suffering be reduced to its present worth as it is that the value of loss or impairment of future earnings be reduced to its present worth."⁵⁶ The court, however, failed to express any reason why it thought such reduction would be proper. The statement was met by a strong dissent written by Justice Wenke and joined in by Justice Boslaugh. In noting that the statement was merely dicta, Justice Wenke stated that it was clearly erroneous and that there was no Nebraska authority for it.⁵⁷ In support of his opinion he cited the *Candler*, *Kepler*, and *Culver* decisions as being clear authority that in Nebraska future pain and suffering damages should not be reduced to present value.⁵⁸

In *Zawada*, the defendants complained that the trial court erred in failing to instruct the jury to reduce to its present worth any amount allowed for future pain and suffering.⁵⁹ The court, citing *Wolfe*, stated that "[i]f a defendant does not tender an instruction proper to the evidence for a present worth recovery of damages, it is not error for the trial court to fail to instruct thereon."⁶⁰ It is important to note that the court never expressly addressed the issue of whether future pain and suffering damages should be reduced to present worth. Also, the court's language does not infer that the *Wolfe* dicta would in fact have been applied even if the defendant had requested such an instruction.

Finally, in *Oberhelman*, the plaintiff contended that the trial court committed prejudicial error in instructing the jury that any award for future pain and suffering should be reduced to present value.⁶¹ The plaintiff relied on the *Candler* decision for his authority that such damages were not to be discounted.⁶² In reply, the court merely cited to the *Wolfe* dicta calling for a present value reduction and held that it was therefore not prejudicial error for the trial court to instruct the jury to reduce future pain and suffering damages to present value.⁶³ Once again, the court failed to give any rationale to explain why it now felt that a reduction of future pain and suffering damages was necessary. Instead, in an

55. *Wolfe v. Mendel*, 165 Neb. 16, 25-26, 84 N.W.2d 109, 115 (1957).

56. *Id.* at 27, 84 N.W.2d at 115-16.

57. *Id.* at 32, 84 N.W.2d at 118 (Wenke, J., dissenting).

58. *Id.*

59. *Zawada v. Anderson*, 181 Neb. 467, 472, 149 N.W.2d 329, 333 (1967).

60. *Id.*

61. *Oberhelman v. Blount*, 196 Neb. 42, 49, 241 N.W.2d 355, 360 (1976).

62. *Id.*

63. *Id.*

attempt to substantiate its reliance on the *Wolfe* dicta, the court pointed out that the trial court had properly given the 1969 court-approved Nebraska Jury Instruction No. 4.13.⁶⁴ However, this latter point brought out by the court, when given close inspection, really does little to substantiate or explain its reason for requiring the present value reduction for future pain and suffering damages. In fact, it actually creates more doubt as to why the reduction was required. The Nebraska Jury Instructions, like the old 1965 edition of the federal jury instructions,⁶⁵ require that juries be instructed to reduce future pain and suffering damages to present value.⁶⁶ However, the comment following it immediately raises the question, "[s]hould damages for future pain and suffering be reduced to present value?"⁶⁷ This would seem to indicate that the drafters were not taking a firm position. The comment then lists *Candler*, *Kepler*, and *Culver* as authority opposed to the reduction to present value.⁶⁸ On the other hand, they were only able to list the *Wolfe* dicta as being any authority whatsoever for the present value reduction.⁶⁹ In light of this, it is unclear why the drafters proceeded to put the reduction requirement in Nebraska Jury Instruction No. 4.13. It may have been because they felt that on the basis of *Wolfe*, it would only be a matter of time before the Nebraska Supreme Court would expressly so hold. Regardless of what the true reason was for drafting the instruction as it was, it is clear that the court's reference to it in *Oberhelman* does little to explain why future pain and suffering damages should now be reduced to present value.

In conclusion, the court in *Oberhelman* stated: "Juries in Nebraska have been 'striking a balance' on future pain and suffering by reducing it to its present worth for many years. We see no reason to depart from that rule."⁷⁰ But again the court failed to give any indication why these Nebraska juries, in what must be unreported lower court decisions, had been requiring the reduction when the greater weight of Nebraska Supreme Court case law had been to the contrary. One can only speculate that they had been doing so on the basis of the 1969 Nebraska Jury Instruction No. 4.13. But as was previously pointed out, that instruction, in itself,

64. NEBRASKA SUPREME COURT COMMITTEE ON PATTERN JURY INSTRUCTIONS, NEBRASKA JURY INSTRUCTIONS No. 4.13 (1969) [hereinafter cited as N.J.I.].

65. W. MATHES & E. DEVITT, *supra* note 45.

66. N.J.I., *supra* note 64, No. 4.13.

67. *Id.* No. 4.13 comment.

68. *Id.*

69. *Id.*

70. 196 Neb. at 49, 241 N.W.2d at 360.

does little to explain why a reduction of future pain and suffering damages is now necessary or proper in Nebraska.

The previous review of cases cited by the court in *Abbott* as authority for its holding that Nebraska juries should be instructed to reduce future pain and suffering damages to present value brings one to a troubling conclusion. Nebraska, a state whose cases played a major role in establishing a national precedent of not reducing future pain and suffering damages to present value, has now reversed its field and joined the minority view requiring a present value reduction of such damages without a decision expressly stating why such a move was necessary or proper. The court in *Abbott* conceded that, "[t]he utility of the rule is arguable, but it is one that everybody can live with if the rule is certain."⁷¹ This type of rationale can hardly be said to be of sufficient weight to justify a state supreme court from leaving a solid majority view and adopting a highly questionable minority position.

Although it has never expressly so stated, it is probably safe to assume that the reason the Nebraska Supreme Court has now deemed it necessary to reduce future pain and suffering damages to present value is that it fears it has been unduly penalizing defendants and correspondingly overcompensating plaintiffs in the past. As the United States Supreme Court has said: "It is self-evident that a given sum of money in hand is worth more than the like sum of money payable in the future."⁷² Therefore, "the purpose of reduction to present worth is to equalize, as much as possible, the loss to the defendant and the unwarranted windfall to the plaintiff arising from the present assessment and payment, in a lump sum, of future and prospective loss and damage."⁷³ Applying this reasoning to future pain and suffering damages, the theory is that because the defendant is required to pay a lump sum judgment when the loss is a prospective one, "[t]he earning power of money would thus produce an overpayment at the time the prospective loss actually occurs unless the award had been reduced."⁷⁴ Damages recoverable for torts are those that will reasonably compensate the plaintiff for the wrong that was inflicted upon him. The Nebraska Supreme Court's decision in *Abbott* appears then to be based on the theory that it would be more reasonable to require damages for future pain and suffering to be reduced to present value. "Otherwise the defendant is unduly and improperly penalized by being required

71. 197 Neb. at 16, 246 N.W.2d at 650.

72. *Chesapeake & Ohio Ry. v. Kelley*, 241 U.S. 485, 489 (1916).

73. Leasure, *How to Prove Reduction to Present Worth*, 21 OHIO ST. L.J. 204 (1960).

74. *Id.* at 206.

to pay a sum worth more than the amount computed by the jury as necessary to fully compensate the plaintiff as the future loss occurs, and the plaintiff in effect is being overpaid."⁷⁵

Obviously, the Nebraska Supreme Court's goal is to award the most accurate and precise damage award possible. The *Abbott* decision indicates that the court believes a reduction to present value will make the award of future pain and suffering damages more accurate and precise for the defendant. The court, however, has ignored certain factors which would make pain and suffering awards more accurate and precise from the plaintiff's standpoint. If the jury is now to be instructed to discount pain and suffering awards, it seems only logical that they should also be instructed to consider the factors of future inflation and prejudgment interest when making their awards. However, as will be seen, the plaintiff's attorney who requests a Nebraska court to have the jury so instructed stands little chance of having it carried out.

IV. INFLATION

The Nebraska Supreme Court and the Court of Appeals for the Eighth Circuit, in applying Nebraska law, have taken a dim view of requests to instruct the jury to consider future inflation and attempts to introduce expert testimony concerning inflation. In 1955, the Nebraska Supreme Court in *Segebart v. Gregory*⁷⁶ held that:

Juries have the right to take into consideration the purchasing power of money with respect to commodities that are in use by the public generally and may reasonably be said to constitute the necessities of life. . . . From that it does not follow that a court is required to instruct on that subject matter. The value of money is a representative one. It is fixed by the value of the thing or things for which it can be exchanged. Whether that value has depreciated or appreciated with reference to some other period is not material. The value of money, i.e. its purchasing power, is elemental within the knowledge and experience of men generally. It is one of the facts of life which jurors are presumed to know. It is not error for failure to instruct relative to the purchasing power of money. It is not a proper subject for an instruction.⁷⁷

This holding has been recently approved by the court in *McClellan v. Dobberstein*.⁷⁸ Recently, the eighth circuit in *Riha v. Jasper Blackburn Corp.*⁷⁹ was faced with the issue as to whether expert testimony concerning inflation and its effect on future values was

75. *Id.* at 207.

76. 160 Neb. 64, 69 N.W.2d 315 (1955).

77. *Id.* at 68, 69 N.W.2d at 318.

78. 189 Neb. 669, 673, 204 N.W.2d 559, 562 (1973).

79. 516 F.2d 840 (8th Cir. 1975).

admissible evidence under Nebraska law.⁸⁰ Noting that it was a question of first impression before the court,⁸¹ considerable weight was accorded the *Segebart* decision, and on that basis the court concluded that "the Nebraska Supreme Court would also prohibit direct testimony on inflation over a person's life or work expectancy."⁸² The court acknowledged that both the state and federal courts were divided on the admissibility of an economist's testimony concerning the effect of future inflation on the purchasing power of the dollar.⁸³ It cited *McWeeney v. New York, N.H. & H. Railroad*⁸⁴ and *Sleeman v. Chesapeake & Ohio Railway*,⁸⁵ as two leading decisions excluding such evidence.⁸⁶ On the other hand, it recognized the much more recent case of *Schnebly v. Baker*⁸⁷ for holding that such evidence be admitted.⁸⁸ The court further observed⁸⁹ that the *Sleeman* decision had in fact been weakened by the sixth circuit's later observation that the reference to the exclusion of expert testimony on inflation was mere dictum,⁹⁰ and by its recent opinion in *Bach v. Penn Central Transportation Co.*,⁹¹ where it had stated in relevant part:

[I]nflation is a fact of life within the common experience of all jurors. Admittedly, if the jury considers this issue without expert testimony, their calculations will be even more imprecise. There is always a chance that the verdict may be too generous. But if jurors should be prohibited from applying their common knowledge of inflation in reaching a verdict, the party entitled to recovery could be grievously under-compensated. The court can always rectify an exorbitant verdict through its power of remittitur.⁹²

However, despite its recognition of a new trend in the United States to admit expert testimony on inflation, the eighth circuit concluded that the *Bach* decision more accurately reflected the rule in Nebraska.⁹³

80. *Id.* at 843.

81. *Id.*

82. *Id.*

83. *Id.* at 844.

84. 282 F.2d 34 (2d Cir. 1960).

85. 414 F.2d 305 (6th Cir. 1969).

86. 516 F.2d at 844.

87. 217 N.W.2d 708 (Iowa 1974).

88. 516 F.2d at 844.

89. *Id.* at 844.

90. See *Willmore v. Hertz Corp.*, 437 F.2d 357 (6th Cir. 1971) (court permitted expert testimony on inflation to be considered by a jury under Michigan law).

91. 502 F.2d 1117 (6th Cir. 1974).

92. *Id.* at 1122.

93. *Riha v. Jasper Blackburn Corp.*, 516 F.2d at 845.

The Nebraska Supreme Court has not yet had the opportunity to decide whether the *Riha* decision was a proper interpretation of Nebraska law. Presently then, it appears that in Nebraska, the jury may not be instructed to consider inflation nor may expert testimony on inflation over a person's life or work expectancy be introduced to aid the jury. Consequently, the only way that inflation of this type may be considered by a Nebraska jury is if one of the jurors brings up the issue during the deliberations.⁹⁴

The Nebraska law in regard to the consideration of inflation, however, is antiquated and out of touch with economic reality. In the past, courts universally rejected considerations of future inflation as a factor in computing future loss. An often cited reason for this rejection was the argument made by Harper and James which stated in relevant part:

Future trends in the value of money are necessarily unknown and so always render such damages speculative in a way we cannot escape. If the estimates represent a straightline projection of present living costs, they will be frustrated by fluctuations either way. If prophecy of change is heeded, frustration will follow if no change, or the opposite change, occurs. When courts have consciously grappled with the problem they have either found all prophecy too speculative and so, perforce, have taken the equally speculative course of betting on a continuance of the status quo; or they have made intuitive and not always very wise judgments that present conditions represent a departure from some imaginary norm to which they think we shall rapidly return. It is not at all clear that courts would be willing to hear experts on the matter, or that they would get much real help if they did. For the most part the problem—which is inevitably present in every case of future loss—is not analyzed and the present value of money is assumed to be the proper basis.⁹⁵

At one time, six of the eleven federal circuit courts of appeals followed this view.⁹⁶ As was noted by the *Riha* court,⁹⁷ one of the two leading decisions supporting this view is the sixth circuit's holding in *Sleeman v. Chesapeake & Ohio Railway*.⁹⁸ In that case, the plaintiff, Sleeman, had been awarded substantial damages in an ac-

94. See 37 OHIO ST. L.J. 138, 146 (1976).

95. 2 E. HARPER & F. JAMES, THE LAW OF TORTS § 25.11 (1956) (footnotes omitted).

96. *Johnson v. Penrod Drilling Co.*, 510 F.2d 234 (5th Cir. 1975); *Magill v. Westinghouse Electric Corp.*, 464 F.2d 294, 301 (3d Cir. 1972); *Williams v. United States*, 435 F.2d 804, 807 (1st Cir. 1970); *Sleeman v. Chesapeake & Ohio Ry.*, 414 F.2d 305, 308 (6th Cir. 1969); *Furumizo v. United States*, 381 F.2d 965, 970 (9th Cir. 1967); *McWeeney v. New York, N.H. & H.R.R.*, 282 F.2d 34, 38 (2d Cir. 1960).

97. 516 F.2d at 844.

98. 414 F.2d 305 (6th Cir. 1969).

tion brought under the Federal Employers Liability Act.⁹⁹ The court of appeals remanded the case on one issue, namely that the trier of fact, the district judge, failed to reduce the damages award to present value.¹⁰⁰ In vacating the trial court's judgment, the Court of Appeals for the Sixth Circuit in effect ruled that inflation was not to be considered.¹⁰¹ The district judge had not discounted Sleeman's award for future earning capacity because an expert economic witness had previously testified in his court¹⁰² that inflationary trends would offset any present worth reduction. In reply to this, the court of appeals stated that damages in a Federal Employers Liability Act case were to be decided by federal law.¹⁰³ It then stated that federal law, according to *Chesapeake & Ohio Railway v. Kelley*,¹⁰⁴ required that future payments be reduced to their present value.¹⁰⁵

Additionally the court stated that the main case relied upon by the district judge¹⁰⁶ was "not authority for the offset in this case, since it has been reversed on other grounds."¹⁰⁷ The court then expressly discouraged the trial courts in its circuit from exploring "such speculative influences on future damages as inflation and deflation."¹⁰⁸ In closing, the court took note of the Harper and James statement of the prevailing view on inflationary evidence¹⁰⁹ and concluded as follows:

Of course, the nation's economic history since the 1930's would appear to make the use of present wages as the standard for loss of future earnings somewhat unfair to plaintiffs. But as to the future, the inflation versus deflation debate rages inconclusively at the highest policy levels of our government, in national electoral campaigns, in learned economic journals and is exemplified in the daily gyrations of the stock markets. The debate seems unlikely to be resolved satisfactorily in one personal injury trial. And if testimonial resolution of this factor bearing on the future is attempted, the door is opened to similarly speculative and debatable offsets tending in other directions.¹¹⁰

99. 45 U.S.C. §§ 51-60 (1970).

100. 414 F.2d at 307.

101. *Id.* at 308.

102. *Pierce v. New York Cent. R.R.*, 304 F. Supp. 44, 45-46 (W.D. Mich. 1969); *Gowdy v. United States*, 271 F. Supp. 733, 752 (W.D. Mich. 1967), *rev'd on other grounds*, 412 F.2d 525 (6th Cir. 1969).

103. 414 F.2d at 307.

104. 241 U.S. 485 (1916).

105. 414 F.2d at 307.

106. *Gowdy v. United States*, 271 F. Supp. 733 (W.D. Mich. 1967), *rev'd on other grounds*, 412 F.2d 525 (6th Cir. 1969).

107. 414 F.2d at 307-08.

108. *Id.* at 308.

109. *Id.*

110. *Id.*

The *Sleeman* decision has, however, been greatly weakened in recent years. The passage of Harper and James which was cited by the Court of Appeals for the Sixth Circuit was taken from the 1956 edition.¹¹¹ If reference is made to the comment in the 1968 supplement¹¹² one finds that, "[a]s James suggests, inflation is not a temporary phenomenon, nor is it one of recent or uncertain origin. Inflation is an essential characteristic of a viable money economy."¹¹³ Furthermore, the decision has been attacked for its improper interpretation of *Kelley*. It is now felt that the *Kelley* court did not intend to set up an inflexible rule for calculating future damages. Instead the decision merely represents the court's concern for one aspect of the future damages problem and stands as a holding in favor of accurate compensation for injured parties. "*Kelley* does not stand for the view that no allowance should be made for future inflation. Thus, it seems the *Sleeman* court offended the spirit of the *Kelley* reasoning by its blind adherence to the present value requirement and its failure to make an allowance for future inflation."¹¹⁴ Finally, the Court of Appeals for the Sixth Circuit, the former voice of the *Sleeman* doctrine, has since expressly recognized that the ruling as to consideration of current economic trends was dicta.¹¹⁵ The court has vacated the application of the *Sleeman* decision to state-created causes of action at least in so far as Michigan is concerned.¹¹⁶

With the weakening of *Sleeman*, there now exists a growing belief that evidence of future inflation should be considered in determining future damages. "This is evidenced by three of the six circuit courts, which previously held that evidence of future inflation is inadmissible, now modifying their position to hold that such evidence is admissible."¹¹⁷ Additionally, the United States Supreme

111. E. HARPER & F. JAMES, *supra* note 95.

112. *Id.* § 25.11 comment nn.8-9 (Supp. 1968).

113. Henderson, *Some Recent Decisions on Damages; With Special Reference to Questions of Inflation and Income Taxes*, 40 INS. COUN. J. 423, 430 (July 1973).

114. Comment, *Damages for Loss of Future Income: Accounting for Inflation*, 6 U.S.F.L. REV. 311, 319 (1972).

115. *Willmore v. Hertz Corp.*, 437 F.2d 357, 360 (6th Cir. 1971).

116. *See id.*

117. Comment, *Inflation and Future Loss of Earnings*, 27 BAYLOR L. REV. 281, 282 (1975). The author lists the three circuits as follows: second circuit: *Perry v. Allegheny Airlines, Inc.*, 489 F.2d 1349 (2d Cir. 1974); sixth circuit: *Willmore v. Hertz Corp.*, 437 F.2d 357 (6th Cir. 1971); United States Steel Corp. v. Lamp, 436 F.2d 1256 (6th Cir. 1970) (holding that proper evaluation of earning capacity would include a projection of earning history, taking into account all data relevant to the wage adjustment), *cert. denied*, 402 U.S. 987 (1971), *rehearing den.*, 403 U.S. 940 (1971); ninth circuit: *McCauley v. United States*, 470 F.2d 137 (9th Cir. 1972).

Court has approved a future damage award based on evidence of future inflationary wage increases.¹¹⁸

Many state courts have also decided that projections of future inflationary trends qualify as valid evidence. The supreme courts of Oregon,¹¹⁹ Montana,¹²⁰ Kansas,¹²¹ and Iowa,¹²² along with the Texas Court of Civil Appeals,¹²³ have all ruled that testimony by expert economists in regard to future inflation is admissible. Of particular note is the Iowa case of *Schnebly v. Baker*¹²⁴ which was cited by the *Riha* court.¹²⁵ The case involved a personal injury suit brought on behalf of a newborn child against a doctor for medical malpractice.¹²⁶ The trial court awarded \$912,124 to the child for severe brain damage, including awards for future care and therapy, future loss of earning capacity, future pain and suffering, and total disability.¹²⁷ On appeal, the defendant assigned as one error the fact that the trial court did not discount the amounts allowed for future damages to their present value.¹²⁸ Based on the expert testimony of Professor Charles E. Marberry, the trial court had found that future inflationary increases in price levels would approximately equal the rate of return on money.¹²⁹ Because of this, the trial court held that the future inflationary increases would offset the discount rate and therefore no reduction to present value should be made.¹³⁰ In reviewing the decision on appeal, the Iowa Supreme Court took note of the *Sleeman* decision rejecting the use of anticipated inflation to offset the earning power of money presently paid.¹³¹ However, the court held that on the basis of *Schmitt v. Jenkins Truck Lines, Inc.*¹³² the offset was entirely proper in Iowa.¹³³ The court concluded as follows:

118. *Grunenthal v. Long Island R.R.*, 393 U.S. 156 (1968).

119. *Plourd v. Southern Pac. Transp. Co.*, 266 Or. 666, 672-79, 513 P.2d 1140, 1144-47 (1973).

120. *Resner v. Northern Pac. Ry.*, 161 Mont. 177, 182-83, 505 P.2d 86, 88-89 (1973).

121. *Hampton v. State Highway Comm'n*, 209 Kan. 565, 584, 498 P.2d 236, 252 (1972).

122. *Schnebly v. Baker*, 217 N.W.2d 708, 727-28 (Iowa 1974).

123. *Williams v. General Motors Corp.*, 501 S.W.2d 930, 940 (Tex. Civ. App. 1973).

124. 217 N.W.2d 708 (Iowa 1974).

125. *Riha v. Jasper Blackburn Corp.*, 516 F.2d 840, 844 (8th Cir. 1975).

126. 217 N.W.2d at 716.

127. *Id.* at 725.

128. *Id.* at 726.

129. *Id.* at 727.

130. *Id.*

131. *Id.*

132. 170 N.W.2d 632 (Iowa 1969).

133. 217 N.W.2d at 727-28.

The judges appear to have agreed, therefore, that future inflation may be considered if shown by the evidence. Future inflation was shown by the evidence here, and the evidence further showed that the inflation rate and discount rate would offset each other. In Schmitt, Professor Marberry increased the future damages by the rate of inflation and reduced such increased future damages by the discount rate. Here he testified that such process was unnecessary since the two rates were a standoff. Under the two opinions in the Schmitt case and the evidence in the present case, the process adopted by the trial court was permissible.¹³⁴

The Alaska Supreme Court had carried the consideration of inflationary trends one step further. In *Beaulieu v. Elliott*,¹³⁵ the court was confronted with the issues of whether future lost wages and future pain and suffering damages should be reduced to present value.¹³⁶ The court, citing Nebraska case law,¹³⁷ observed that because money had the power to earn money "it has become the generally accepted rule that damages awarded for future loss of earnings should be reduced to present worth."¹³⁸ Additionally, it noted that in applying the general rule, the Washington Supreme Court had stated a formula for reducing awards of future earnings to present value which involved the "rate of interest (which) could fairly be expected from safe investments which a person of ordinary prudence, but without particular financial experience or skill, could make in that locality."¹³⁹ It should be noted that this is practically a verbatim copy of the formula given in Nebraska Jury Instruction No. 4.13.¹⁴⁰ The *Beaulieu* court conceded that the formula, "although empirical at best," was probably as definite as one could be.¹⁴¹ However, the court rejected its application because it ignored facts which should not have been ignored.¹⁴² The court concluded as follows:

Annual inflation at a varying rate is and has been with us for many years. There is no reason to expect that it will not be with us in

134. *Id.* at 728.

135. 434 P.2d 665 (Alaska 1967).

136. *Id.* at 670-72, 676.

137. *Borcherding v. Eklund*, 156 Neb. 196, 55 N.W.2d 643 (1952).

138. 434 P.2d at 671.

139. *Id.*

140. The rate of interest to be applied by you in making this determination [present cash value] should be that rate which in your judgment is reasonable under all the circumstances, taking into consideration the prevailing rates of interest in the area which can reasonably be expected from safe investments which a person of ordinary prudence, but without particular financial experience or skill, can make in this locality.

N.J.I., *supra* note 64, § 4.13.

141. 434 P.2d at 671.

142. *Id.*

the future. This rate of depreciation offsets the interest that could be earned on government bonds and many other "safe" investments. . . . Since the plaintiff, through the defendant's fault and not his own, has been placed in the position of having no assurance that his award of future earnings, reduced to present value, can be utilized, so that he will ultimately realize his full earnings, we believe that justice will best be served by permitting the trier of fact to compute loss of future earnings without a reduction to present value. The plaintiff is more likely to be restored to his original condition under the rule we adopt than under the prevailing rule which calls for a discounting of the award for future earnings.¹⁴³

As to the issue of whether awards for future pain and suffering should be reduced to their present worth, the court stated:

The same reasoning [that was applied to future earnings] applies here as to an award for future pain and suffering. Because of the annual rate of inflation offsetting dividends or interest that may be expected on "safe" investments, and of the risk of loss involved in making other investments, a plaintiff is more likely to be restored to his original condition had defendant not committed his tort by allowing the plaintiff his award for future pain and suffering without reduction to present worth.¹⁴⁴

Therefore, in Alaska, there is not even any need to introduce expert testimony as to future inflationary trends. The supreme court has taken judicial notice of such trends and consequently no longer requires a present value reduction for any type of future damage award.

This recent dissolution of the traditional holding that future inflationary increases are too speculative to serve as a basis for determining future damages is the result of a growing belief that in establishing future losses some speculation is inevitable. The necessarily speculative nature of a future inflation projection should not, however, be allowed to serve as an excuse for making no projection at all. Every day courts must make speculative predictions when awarding damages for future losses. "For example, the court must predict the rate of return that investments will earn in the future, as well as the injured party's life expectancy, the extent and duration of his disability and his future medical expenses."¹⁴⁵ Despite the highly speculative nature of these predictions, courts continue to estimate the future losses of the injured parties, because it would be extremely unjust to refuse them future damages simply on the basis that such damages cannot be established with certainty at trial.¹⁴⁶ It is obvious that to refuse to grant an injured party any

143. *Id.*

144. *Id.* at 676.

145. Comment, *supra* note 114, at 320.

146. *Id.* at 320-21.

allowance for future inflation merely because its rate cannot be established with complete certainty is similarly unjust.¹⁴⁷

"By way of contrast, discounting to present value is an economic and mathematical refinement more fictional and speculative than an allowance for future inflation."¹⁴⁸ When discounting an award speculations must be made as to how and in what investments the plaintiff will invest. Since people invariably invest their money differently under changing circumstances, those speculations will probably be incorrect. Consequently, the prediction as to the investment potential of the future damage award will be highly fictional. On the other hand, the allowance for future inflation is dependent only on expert projections of future trends. These estimates of future trends in the cost of living are not merely guesses. "By considering current government monetary and fiscal policy, looking at private spending and investment trends, and studying past changes in the value of the dollar, economists can make reasonable projections of future price trends based on their historical, statistical and analytical knowledge."¹⁴⁹

In conclusion, the legal and economic principle underlying the assessment of damages is that the injured party receive compensation equivalent to his injury.¹⁵⁰ When measuring damages caused, the most accurate possible approximation of loss should be sought. The Nebraska Supreme Court has evidenced its belief in this theory with the decision in *Abbott* requiring a present value reduction of damages awarded for future pain and suffering. But the ultimate accuracy and fairness of an award for damages is dependent upon the extent to which the jury is permitted to evaluate all the factors which have a significant effect on the calculation of the plaintiff's losses. It seems only logical that if the Nebraska Supreme Court is now willing to give the defendant the benefit of reduction to present value in regard to damage awards for future pain and suffering, it should also be willing to allow the plaintiff consideration for future inflationary trends which will shrink the purchasing power of the damages awarded him for his pain and suffering.

Admittedly, the Nebraska case law has not completely prohibited the jury from considering inflationary trends. However, in disallowing requests to instruct the jury on inflation and attempts to introduce expert testimony on inflation over a person's life or work expectancy, the present law unduly prejudices the plaintiff. Even

147. *Id.*

148. Note, *Future Inflation and the Undercompensated Plaintiff*, 4 LOY. CHI. L.J. 359, 366 (1973).

149. Comment, *supra* note 114, at 321.

150. See *Bussy v. Donaldson*, 4 U.S. (4 Dall.) 206 (1800).

if it is assumed that the jury is aware of past changes in the purchasing power of the dollar, it is unlikely that they will properly consider them when making their award. If the jury considers the issue without the aid of instructions or expert testimony, its calculations will undoubtedly be imprecise.¹⁵¹ The present Nebraska method of letting the jury grapple with the inflation issue in deliberations without the aid of guidelines greatly increases the possibility that the judgment will be either too small or too large. Therefore, it would seem to be in the best interests of both the plaintiff and the defendant to permit expert testimony on the matter at trial and to expressly instruct the jury to give that testimony as much weight as it chooses when making the award. "It seems unlikely that their conclusions will be any less valid from having heard the testimony . . . and they may be much more correct than otherwise."¹⁵²

V. PREJUDGMENT INTEREST

The Nebraska Supreme Court and the Court of Appeals for the Eighth Circuit, in applying Nebraska law, have taken just as firm a stance against awarding prejudgment interest in tort claims as they have in denying expert testimony or instructions on inflationary trends. The supreme court's rule on awarding prejudgment interest was clearly stated in the 1953 case of *National Fire Insurance Co. of Hartford v. Evertson*.¹⁵³ The decision in pertinent part held:

If a claim for damages is a matter of reasonable controversy, unliquidated, incapable of being fixed by computation, and may only be ascertained by agreement of the parties concerned or by legal action, recovery of interest may be had only from the date of determination of the right of recovery and the ascertainment of the amount. . . . This court has recognized that in order to recover interest there must be a determinate amount which could have been tendered and interest thereby stopped; the amount of the claim must be known and determined, or readily determinable.¹⁵⁴

In October of 1976, the eighth circuit followed the *National Fire* ruling when it decided the tort claim in *Lienemann v. State Farm Mutual Auto Fire & Casualty Co.*¹⁵⁵ Since it would be a rare instance when a claim for pain and suffering damages would ever be a "determinate amount," "liquidated," and capable of "being fixed

151. See text accompanying note 92 *supra*. The Riha court, citing to *Bach*, expressly admitted this fact.

152. *Scruggs v. Chesapeake and Ohio Ry.*, 320 F. Supp. 1248, 1251 (W.D. Va. 1970).

153. 157 Neb. 540, 60 N.W.2d 638 (1953).

154. *Id.* at 543, 60 N.W.2d at 639-40.

155. 540 F.2d 333, 343 (8th Cir. 1976).

by computation," the present chances of getting prejudgment interest on a pain and suffering damages award in Nebraska appear slim.

It should be noted, however, that the liquidated-unliquidated damages distinction used by the Nebraska court is based on the outdated "penalty theory" of granting interest. Originally, a number of jurisdictions used the distinction to decide whether prejudgment interest should be awarded. It was generally held that such interest should only be allowed on liquidated claims.¹⁵⁶ The theory was that the "defendant should be penalized for not promptly paying the amount owed, but it was considered unfair to impose a penalty for not paying an obligation which was uncertain in amount."¹⁵⁷

The liquidated-unliquidated distinction has since been repudiated or ignored in many jurisdictions.¹⁵⁸ The rationale has been that once a verdict liquidates a claim as of a prior date, interest should be granted from that date.¹⁵⁹ The United States Supreme Court stated years ago in regard to contract claims that:

It has been recognized that a distinction, in this respect, simply as between cases of liquidated and unliquidated damages, is not a sound one. Whether the case is of the one class or the other, the injured party has suffered a loss which may be regarded as not fully compensated if he is confined to the amount found to be recoverable as of the time of breach and nothing is added for the delay in obtaining the award of damages. Because of this fact, the rule with respect to unliquidated claims has been in evolution . . . and in the absence of legislation the courts have dealt with the question of allowing interest according to their conception of the demands of justice and practicality.¹⁶⁰

So also, a refusal to allow prejudgment interest on tort claims has been criticized.¹⁶¹ The departures from the liquidated-unliquidated distinction have become so numerous that it cannot safely be used as a rule of thumb today.¹⁶² Recent cases have begun to ignore the distinction and allow prejudgment interest on a claim even though it is unliquidated if justice and fairness so require.¹⁶³ Presently the trend has been to award prejudgment interest on the basis of a pecuniary-nonpecuniary loss distinction.¹⁶⁴ The general rule is that if the loss is pecuniary,¹⁶⁵ prejudgment interest should be allowed,

156. See 22 AM. JUR. 2d *Damages* § 181 n.11 (1965).

157. 15 STAN. L. REV. 107, 107-08 (1962).

158. See Annot., 36 A.L.R.2d 337, 345 (1954).

159. See 1 A. SEDGWICK, *DAMAGES* § 300 (9th ed. 1912).

160. *Funkhouser v. J.B. Preston Co.*, 290 U.S. 163, 168-69 (1933).

161. See *Busik v. Levine*, 63 N.J. 351, 307 A.2d 571 (1973).

162. *Emery v. Tilo Roofing Co.*, 89 N.H. 165, 170, 195 A. 409, 412 (1937).

163. See 22 AM. JUR. 2d *DAMAGES* § 181 nn. 18 & 19 (1965).

164. See 15 STAN. L. REV. 107, 108 (1962).

165. See C. McCORMICK, *LAW OF DAMAGES* § 56 (1935). An injury is pecuniary where it diminishes the amount or value of plaintiff's property or impairs his earning capability.

but if it is nonpecuniary,¹⁶⁶ interest is to be denied.

In rejecting the penalty theory on which the liquidated-unliquidated damages rule rested, the courts have established two new theories to aid them in deciding whether prejudgment interest should be awarded. The first is the "loss theory" under which it is reasoned that the plaintiff, due to the inherent income-producing ability of money, has suffered additional pecuniary loss because of the deprivation during the interim of a damage award rightfully due him.¹⁶⁷ Therefore, he should be allowed prejudgment interest in order to make up for the interest on the award that he could have received had he not been forced to wait for it. The second is the "unjust enrichment theory" which is based on the premise that a defendant's liability arises at the time the plaintiff is injured.¹⁶⁸ Consequently, the amount later awarded the plaintiff as damages is deemed to be his property as of the time of injury, and the trial is merely an *ex post facto* determination of these preexisting facts.¹⁶⁹ Therefore, "[t]o the extent that the defendant has been free to use the plaintiff's money without having to pay for it, he has been unjustly enriched."¹⁷⁰ It follows that prejudgment interest must be granted to the plaintiff, not to penalize the defendant, but rather to divest him of this unjustified benefit.

Although the loss theory might not support an award of prejudgment interest for nonpecuniary loss like pain and suffering, it would seem that under the unjust enrichment theory such interest could be justified. The loss theory probably could not be relied on because the "plaintiff has not, strictly speaking, suffered a loss of the income-producing element; his *financial* position has remained unchanged."¹⁷¹ However, under the unjust enrichment theory a more convincing argument can be made that prejudgment interest should be granted on pain and suffering damage awards:

Arguably, defendant's enrichment has not been unjust where the loss is nonpecuniary because the money judgment really has little logical relation to the injury; it is merely a crude attempt to compensate for something which is inherently noncompensable. However, it seems clear that pecuniary and nonpecuniary injuries have the same ultimate effect of diminishing human happiness, the former by destroying the means to obtain it and the latter by destroying the capacity for happiness itself. Thus the distinction is vitiated and reduced to a mere test of ascertainability, for, although

166. See *id.* § 57. Examples of nonpecuniary injuries are pain and suffering, emotional distress, and humiliation and disgrace.

167. See 15 STAN. L. REV. 107, 109 (1962).

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* at 110 (emphasis in original).

it is difficult to argue that defendant has unjustly had the use of plaintiff's capacity for happiness, he has unjustly had the use of the law's compensation therefor. As long as money damages is the method used by our judicial system to compensate for the diminution of happiness, it would seem that plaintiff's immediate right to the money and defendant's unjust enrichment must necessarily follow.¹⁷²

Reasoning of this type has led one court to conclude that if it is fair to discount sums paid now on account of future loss which will not become due until years in the future, then it is by the same token unfair to deny prejudgment interest when there has been a delay in discharging that obligation.¹⁷³

The allowance of prejudgment interest for pain and suffering and other nonpecuniary losses would not only prevent unjust enrichment but would also aid the court process in administering justice. First, the allowance of such interest would encourage settlements and discourage the use of the slow judicial process to coerce plaintiffs into accepting poor settlement offers. It is a matter of common knowledge that insurance companies presently play a major role in the administration of tort law. The present Nebraska view of denying prejudgment interest on pain and suffering damages encourages insurance companies not to settle until just before trial, if at all. A simple example may be used to illustrate this point. Suppose that the insurance company has good reason to believe that it will owe the plaintiff \$500,000 should the case go to trial. If the plaintiff is willing to settle before suit for \$400,000, then the insurance company from an economic standpoint should delay the litigation. At nine percent, the simple interest on the legitimate value of plaintiff's claim is \$45,000 per year.¹⁷⁴ Therefore, for every year it can delay settlement and litigation, the insurance company can recoup \$45,000 of the amount it stands to lose. But it is not the insurance companies that are to be faulted. Under the present system, why should they pay before trial time? The solution to the problem lies not with the insurance companies but with the courts. "It would seem . . . that if the courts were to allow prejudgment interest in tort litigation, insurance companies would thereby have an incentive to effect reasonable payments in meritorious cases rather than seek to advantage themselves of the adversary system."¹⁷⁵ Secondly, the allowance of prejudgment interest

172. *Id.*

173. *See Moore-McCormack Lines, Inc. v. Richardson*, 295 F.2d 583, 594 (2d Cir. 1961).

174. *See Wolf & Evans, A Case for Allowance of Prejudgment Interest in Reference to Wrongful Death Cases*, 17 TRIAL LAW. GUIDE 302 (1973) (indepth analysis of the present relationship of insurance companies and tort litigation).

175. *Id.* at 314.

would benefit the public. Not only do the parties have an interest in the controversy but so does the general public. Delay in the disposition of the case has an impact upon other litigants waiting for their turn to litigate. It also affects the taxpayers who are required to support the system throughout the delay. Finally, it would legitimize the unsupervised actions presently taken by juries to give the plaintiff compensation for his delay. As one court has summarized:

[N]o one would be so naive as to suppose that juries do not throw into the scales the years that a plaintiff may have had to wait before his case can be heard by a jury. . . . It would seem to us to be better to recognize this and have the computation made on a basis which is known and understood.¹⁷⁶

On the basis of the previous considerations calling for the allowance of prejudgment interest on tort claims, several prejudgment interest statutes have recently been passed. England, which was originally responsible for the centuries-old common law rule that denied prejudgment interest in tort cases, now has a national law expressly mandating the allowance of prejudgment interest in personal injury suits.¹⁷⁷ Alaska,¹⁷⁸ Colorado,¹⁷⁹ Louisiana,¹⁸⁰ Michi-

176. *Moore-McCormack Lines, Inc. v. Richardson*, 295 F.2d 583, 594 (2d Cir. 1961).

177. The Law Reform (Miscellaneous Provisions) Act, 1934, 24 & 25 Geo. 5, c. 41, § 3(1) gave any court of record a discretionary power in any proceedings for the recovery of a debt or damages to:

[O]rder that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment

However, what was discretionary under the 1934 Act is now mandatory, in personal injury cases, under the Administration of Justice Act, 1969, 17 & 18 Eliz. 2, c. 58, § 22. The section adds the following subsections to § 3 of the 1934 Act:

(1A) Where in any such proceedings as are mentioned in subsection (1) of this section judgment is given for a sum which (apart from interest on damages) exceeds £200 and represents or includes damages in respect of personal injuries to the plaintiff or any other person, or in respect of a person's death, then (without prejudice to the exercise of the power conferred by that subsection in relation to any part of that sum which does not represent such damages) the court shall exercise that power so as to include in that sum interest on those damages or on such part of them as the court considers appropriate, unless the court is satisfied that there are special reasons why no interest should be given in respect of those damages.

178. ALASKA STAT. § 09.50.280 (1973). The court in *State v. Phillips*, 470 P.2d 266, 273 (Alaska 1970), interpreted this section to allow prejudgment interest on all damages whether liquidated or unliquidated, pecuniary or nonpecuniary, from the time the cause of action arose.

179. COLO. REV. STAT. § 13-21-101 (1973).

180. LA. REV. STAT. ANN. § 13.4203 (West 1968 & Supp. n.10 1977).

gan,¹⁸¹ New Hampshire,¹⁸² New York,¹⁸³ North Dakota,¹⁸⁴ Oklahoma,¹⁸⁵ and Rhode Island¹⁸⁶ have all passed statutes allowing prejudgment interest of some sort in tort claims. New Jersey, by court rule, has also allowed prejudgment interest for torts.¹⁸⁷

Nebraska Revised Statute section 45-103 authorizes the allowance of post-judgment interest but does not address the possibility of granting prejudgment interest.¹⁸⁸ It could be argued that section 45-103 nonetheless precludes the court from granting prejudgment interest, but such reasoning is not sound. The Hawaii Supreme Court was recently confronted with this preclusion argument when deciding a tort claim for conversion.¹⁸⁹ The Hawaii statute,¹⁹⁰ much like section 45-103, allowed interest on any judgment recovered from a Hawaiian court but said nothing about prejudgment interest being awarded. The court concluded that the statute did not preclude it from allowing prejudgment interest on tort claims whenever equity demanded.¹⁹¹ There seems to be no reason why the Nebraska Supreme Court could not adopt a similar policy with regard to section 45-103.

In the past it was thought that future pain and suffering damages were too uncertain to have interest rates applied to them in order to reduce them to present value. A similar argument applied to past pain and suffering damages. They too were thought to be too uncertain to have an interest rate applied to them in order to

181. MICH. COMP. LAWS § 600.6013 (MICH. STAT. ANN. § 27A.6013 (Callaghan 1962)).

182. N.H. REV. STAT. ANN. § 524:1-6 (Supp. 1973).

183. N.Y. CIV. PRAC. LAW § 5001(a)-(c) (McKinney 1963) (damages to property).

184. N.D. CENT. CODE § 32-03-04 (1976).

185. OKLA. STAT. ANN. tit. 12, § 727(2) (West Supp. 1976).

186. R.I. GEN. LAWS § 9-21-10 (Supp. 1976).

187. N.J. COURT RULE 4:42-11(b) (1972). See also *Busik v. Levine*, 63 N.J. 351, 307 A.2d 571 (1973) (holding that the promulgation of the rule constituted an appropriate exercise of the court's constitutional rule-making power).

188. NEB. REV. STAT. § 45-103 (Reissue 1974). The statute reads in relevant part: "Interest on all decrees and judgments for the payment of money shall be from the date of the rendition thereof at a rate of eight dollars upon each one hundred dollars annually until the same shall be paid"

189. See *Lucas v. Liggett & Myers Tobacco Co.*, 51 Haw. 346, 461 P.2d 140 (1969).

190. HAW. REV. STAT. § 478-2 (1968). The statute provided: "Interest at the rate of six per cent a year, and no more, shall be allowed on any judgment recovered before any court in the State, in any civil suit."

191. 51 Haw. at 350, 461 P.2d at 144.

calculate any prejudgment interest owing to the plaintiff. The Nebraska Supreme Court decision in *Abbott*, however, now makes it clear that the court does not feel future pain and suffering awards are so uncertain that they may not be reduced to present value. Therefore, it logically follows that past pain and suffering awards in Nebraska are not so uncertain as to require a denial of prejudgment interest on them to the plaintiff.

VI. CONCLUSION

The Nebraska Supreme Court, in deciding *Abbott*, has indicated a desire to make the awarding of pain and suffering damages more precise and accurate. In requiring that such damages now be reduced to their present value, the court has attempted to make the judgment award more fair and just for defendants. However, the court has thus far completely ignored the interests of fairness and justice from the plaintiffs' vantage point. While the defendants are now given the benefit of reducing the damage award to its present value, the plaintiffs are still being denied the benefit of inflationary factors and prejudgment interest. If true precision and accuracy is the court's goal in awarding pain and suffering damages, these latter considerations cannot be ignored. The ultimate accuracy and fairness of any damage award is dependent upon the extent to which the jury is permitted to evaluate all of the factors which have a significant effect on the calculation of the plaintiff's losses. The Nebraska Supreme Court cannot now be heard to deny consideration of inflation and prejudgment interest on the grounds that such action is required by only a minority of states. In *Abbott* the court demonstrated little hesitation in jumping from a strong majority position to a relatively weak minority view in regard to present value reduction for future pain and suffering damages. The question may arise as to whether the juries, laden with new formulas for calculating a final damage figure, will arrive at any more precise or accurate awards than they did back in the 1920's when no consideration of present value, inflation, or prejudgment interest was required. No matter what one's personal answer to that question might be, the fact remains that the court has now chosen to require a more statistical and mathematical determination of pain and suffering damages. In doing so, it should not allow itself to stop in the middle of the stream. Fairness and justice demand that the court now require Nebraska juries to also consider future inflation and prejudgment interest when calculating pain and suffering damage awards.